Murphy J. 27

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IN THE

Supreme Court of the United States

JANUARY TERM, 1944.

No. 546

IN THE MATTER

OF

The application of MARY V. MURRAY, PHEBE KEIL, CLARENCE HANLON, WILLIAM and HELENA YURICH, GIOVANNI AUGELLO, MARY MAZOUREK, MAX EDELSTEIN, MAY C. SPRINGER, MOLLY BELLER, HARRY KOPELMAN, FRANCES PIRROTTI, ISRAEL BECK, DORA SIMBLOW, CATHERINE M. FRANZ, HERMAN WITTHAUS, LOUISE LITTLE, DIMITRIUS KAVAFIS, ROSE VETTEL, KATHERINE BELLION, MAX LEVINE, ANNA FROELICH, ADOLPH WEISLER, KOSTAS KUSULAS, MARPOL REALTY CORPORATION and 110 EAST 7TH STREET CORPORATION,

Petitioners,

AGAINST

FIORELLO H. LA GUARDIA, as Mayor of the City of New York, JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, NEWBOLD MORRIS, as President of the Council, EDGAR J. NATHAN, JR., as President of the Borough of Manhattan, JOHN CASHMORE, as President of the Borough of Brooklyn, JAMES J. LYONS, as President of the Borough of The Bronx, JAMES A. BURKE, as President of the Borough of Queens, JOSEPH A. PALMA, as President of the Borough of Richmond, constituting the Board of Estimate of the City of New York, the CITY OF NEW YORK, STUYVESANT TOWN CORPORATION and METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of New York.

MARTIN N. WHYMAN,
Of Counsel.

MENAHEM STIM,
Attorney for Petitioners.

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Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of New York.

To the Honorable the Chief Justice of the Supreme Court of the United States of America and the Honorable Associate Justices Thereof:

Your petitioners MARY V. MURRAY, PHEBE KEIL, CLARENCE HANLON, WILLIAM and HELENA YURICH, GIOVANNI AUGELLO, MARY MAZOUREK, MAX EDELSTEIN, MAY C. SPRINGER, MOLLY BELLER, HARRY KOPELMAN, FRANCES PIROTTI, ISRAEL BECK, DORA SIMBLOW, CATHERINE M. FRANZ, HERMAN WITTHAUS, LOUISE LITTLE, DIMITRIUS KAVAFIS, ROSE VETTEL, KATHERINE BELLION, MAX LEVINE, ANNA FROELICH, ADOLPH WEISLER, KOSTAS KUSULAS, MARPOL REALTY CORPORATION and 110 EAST 7TH STREET CORPORATION respectfully submit this petition for a writ of certiorari directed to the Supreme Court of the State of New York, New York County, to review the decision and order of the New York Court of Appeals in the above cause affirming the order of the Appellate Division of the Supreme Court of the State of New York, First Department, which in turn had affirmed an order of the Supreme Court of the State of New York, New York County, denying petitioners' application for a preliminary injunction and granting respondents' cross motion to dismiss the petition for injunctive relief on the merits.

The final order was entered in the office of the County Clerk of New York County on December 9, 1943 upon the remittitur of the Court of Appeals filed on December 3, 1943 making the order of the Court of Appeals the order of the Supreme Court.

Opinions Below.

A written opinion was rendered by the Supreme Court, New York County (R. 183-6). The Appellate Division of the Supreme Court of the State of New York affirmed the order of the Supreme Court, New York County, without opinion, but two Justices joined in a dissenting opinion

R. 194-7). The Court of Appeals affirmed, 4 to 2, the order of the Appellate Division. A written opinion was rendered by the New York Court of Appeals, both by the majority of the Court and the dissenting Chief Judge (R. 207-219).*

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 344).

Questions Presented.

In a four to two decision the New York Court of Appeals upheld the constitutionality of the Redevelopment Companies Law (N. Y. L. 1942, ch. 845 as amended by N. Y. L. 1943, ch. 234) and accordingly affirmed a dismissal of the petition for an injunction by which petitioners sought to restrain the furtherance of a redevelopment project commenced pursuant to the provisions of the aforesaid Redevelopment Companies Law. The principal questions are:

1. Is the power of eminent domain being exercised for a "public use" when private property is taken by a city, under the guise of exercise of such power, and then conveyed to a private corporation, admittedly created for private gain and not subject to regulation by law as to rents, profits, dividends and disposition of its property or franchises.

2. May the power of eminent domain be granted to a city for the purpose of taking private property to be transferred to and thereafter held by a private corporation which is not regulated by law as to rents, profits, dividends and disposition of its property and franchises.

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*These opinions have not yet been officially reported.

Statement.

The petitioners are owners of real property situated in the City of New York and located within the area affected by the operation of the Redevelopment Companies Law enacted by the New York Legislature in 1942 (N. Y. L. 1942, ch. 845) and amended in 1943 (N. Y. L. 1943, ch. 234).

The Redevelopment Companies Law was enacted by the New York Legislature at the request of Mayor La-Guardia and Park Commissioner Moses in an effort to interest insurance companies and savings banks to invest their surplus funds in the building of housing projects and the rehabilitation of slum areas in New York City (R. 161). The companies which the Mayor and the Commissioner hoped to attract by this legislation in 1942 failed to evince the desired interest (R. 161). When Commissioner Moses approached the Chairman of the Board of Directors of the respondent, Metropolitan Life Insurance Company, Commissioner Moses was advised that Metropolitan Life Insurance Company would consider the type of project contemplated by the statute only if the statute was first amended in certain specific respects R. 161-2). The proposed amendments were then prepared by Metropolitan Life Insurance Company (R. 162) and were submitted to the New York Legislature and the bill known as the Mitchell-Hampton Bill was voted by the New York Legislature in the closing days of the session without any public hearing (R. 33, 162). Prior to signing the bill, Governor Dewey expressed doubts concerning some of the provisions of the bill (R. 36) but he signed it and the bill became law on March 30, 1943.

The Redevelopment Companies Law is an enabling act and has its genesis in Article XVIII of the New York State Constitution which authorizes legislative action to provide for low rent housing for persons of low income and the clearance, replanning, reconstruction, rehabilitation of sub-standard and unsanitary areas (R. 45).

This Article in the New York State Constitution empowers the Legislature to "grant the power of eminent domain to any city" (Sec. 2) and also "to any corporation regulated by law as to rents, profits, dividends and disposition of its property or franchises" (Sec. 2). The Legislature is empowered to carry out the purposes of the article "in such manner, by such means and upon such terms and conditions as it may prescribe" (Sec. 1) and further "the Legislature is empowered to make all laws which it shall deem necessary and proper for carrying into execution" the powers conferred in the article (Sec. 10).

In essence the theory of the Redevelopment Companies Law, as originally enacted in 1942 and as amended in 1943, was to provide for the incorporation of "redevelopment companies" to clear and rehabilitate sub-standard and unsanitary areas. The language of the two versions of the statute is almost identical with the exception of those significant instances which gave rise to the proceedings in the courts below and present the precise Constitutional questions involved herein.

Section 23, N. Y. L. 1942, ch. 845 provided:

> "Sec. 23. *Transfer of title or foreclosure of project.* A redevelopment company shall not have power to sell any project without the consent of the local legislative body. * * * "

Section 24, N. Y. L. 1942, ch. 845 provided:

> "Sec. 24.' *Dissolution.* Except upon the expiration of the period of the corporate existence as fixed by its certificate of incorporation or a certificate amending the same, a redevelopment company shall not voluntarily dissolve without the consent of the local legislative body. * * * "

Section 23, N. Y. L. 1943, ch. 234 now provides:

> "Sec. 23. *Transfer of title or foreclosure of project.* Until the termination of the tax exemption, whether by expiration or by any other cause, a redevelopment company shall not have power to sell any project without the consent of the local legislative body. * * * "

Section 24, N. Y. L. 1943, ch. 234 now provides:

> "Sec. 24. *Dissolution.* After termination of any tax exemption granted pursuant to section twenty-six of this act, whether by expiration or by any other cause, or in the event that prior thereto the redevelopment company elects to pay to the municipality the total of all accrued taxes for which such exemption was granted and received, together with interest at the rate of five per centum per annum, the redevelopment company may voluntarily dissolve, and title to the project may be conveyed in fee to the owner or owners of its capital stock or to any corporation designated by it or them for the purpose, or the redevelopment company may be dissolved and reconstituted pursuant to appropriate laws relating to the formation and conduct of corporations, * * *. After such dissolution and conveyance or such reconstitution, the provisions of this act shall become and be inapplicable to any such project and its owner or owners, and any tax exemption granted to such redevelopment company pursuant to section twenty-six of this act shall cease and terminate."

Sections 23 and 24 of ch. 234, N. Y. L. 1943 eliminate supervision by local legislative bodies over the transfer of title to properties acquired by redevelopment companies or the dissolution of such companies and provide that by

merely waiving tax exemption and repaying accrued taxes for which exemption was granted, plus 5% interest, a redevelopment company may at any time "voluntarily dissolve" or be "reconstituted" and convey title to the project in fee to a private corporation or individual or even to itself as "reconstituted" and that after such dissolution or conveyance the provisions of the act are to be inapplicable to the new owners of the project.

A comparison of the sections 23 and 24 of the 1942 statute with the amendatory provisions of the 1943 statute shows that the amendments have the effect of increasing the rights, benefits and powers accruing to a redevelopment company and at the same time eliminate the specific safeguards and controls imposed by Article XVIII of the New York State Constitution.

Stuyvesant Town Corporation (hereinafter sometimes called "Stuyvesant") was organized as a redevelopment corporation by and as a wholly owned subsidiary of Metropolitan Life Insurance Company for the purpose of carrying out the provisions of the Redevelopment Companies Law, as amended in 1943 (R. 14, 42). A plan of rehabilitation to be undertaken by Stuyvesant was prepared and on May 5, 1943 the City Planning Commission, whose approval of the plan was necessary under the statute, held its first meeting. A second meeting was held on May 19, 1943 and in spite of vociferous objection on the part of owners and tenants in the locality affected, the Commission by a 5 to 1 vote approved the plan (R. 34-5, 73-158).

On June 3, 1943, a meeting of the Board of Estimate was scheduled for the purpose of voting on the plan approved by the City Planning Commission and in anticipation of this meeting the proposed contract between the City of New York and Stuyvesant was prepared (R. 16, 159-160) so that authorization could be given to proceed in accordance with the terms and provisions thereof.

The contract proposed to be entered into between the City of New York and Stuyvesant provides in Article II

thereof for the making of surveys or maps by Stuyvesant of the property necessary to be acquired and the commencement by the City of New York "at the request of" Stuyvesant of condemnation proceedings of all property in the area and the payment by Stuyvesant to the City of New York of all sums expended or required to be expended by the City of New York in connection with the acquisition of the property so to be condemned (R. 53).

Although Article XVIII of the New York State Constitution empowered the Legislature to grant the power of eminent domain either to a municipality or to a private corporation regulated by law as to rents, profits, dividends and disposition of its property or franchises (Sec. 2), the Redevelopment Companies Law, as amended in 1943, granted the power of eminent domain only to the municipality but the same section also provides (Sec. 20):

> "When title to the real property shall have vested in the municipality it shall convey the same to the redevelopment company * * *."

Proceedings under Article 78 of the New York Civil Practice Act were instituted in the Supreme Court, New York County, by order to show cause dated, May 28, 1943 to restrain the furtherance of the project and the plan to be submitted to the Board of Estimate at its meeting of June 3, 1943 (R. 9-11). In accordance with the decision of Schreiber, *J.*, of the Supreme Court of the State of New York, New York County, an order was entered in the County Clerk's office of New York County on June 4, 1943, denying the application for injunctive relief and granting a cross motion made by respondents to dismiss the petition on the merits (R. 6-8). By order dated July 2, 1943, the Appellate Division of the Supreme Court affirmed, 3 to 2, without opinion, the order of the Supreme Court. The two dissenting Justices joined in a dissenting opinion (R. 193-7). By order entered December 2, 1943, the New York Court of Appeals, affirmed, 4 to 2, the order of the

Appellate Division, the dissenting opinion being written by the Chief Judge (R. 218-219).

Specification of Errors.

The court below erred,

1. in holding that the condemnation of private property under the authority of the Redevelopment Companies Law, as amended in 1943, was for a public use;

2. in failing to hold that the condemnation of private property under the authority of the Redevelopment Companies Law, as amended in 1943, violated the due process clause of the Fourteenth Amendment;

3. in upholding the exercise of the power of eminent domain under the authority of the Redevelopment Companies Law, as amended in 1943, in violation of the due process clause of the Fourteenth Amendment, so as to permit Stuyvesant Town Corporation to acquire private property by condemnation when such corporation was not "regulated by law as to rents, profits, dividends and disposition of its property and franchises", as prescribed in Article XVIII of the New York State Constitution;

4. in holding, in violation of the due process clause of the Fourteenth Amendment, that there was no requirement that Stuyvesant Town Corporation be subjected to regulation as to rents, profits, dividends and disposition of property or franchises acquired by it.

Reasons Relied on for the Allowance of the Writ.

1. The majority of the New York Court of Appeals has erroneously misconceived the use to which the prop-

erty was to be put which was the subject of the condemnation proceedings authorized by the Redevelopment Companies Law. The Court below stated that it found no basis for the constitutional objection urged by petitioners that the condemnation of private property authorized by the statute is not for a public use (R. 214).

There is no specific prohibition in the Federal Constitution which acts upon the states in regard to their taking of private property for any but a public use. The Fifth Amendment which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the Federal government. *Spies* v. *Illinois,* 123 U. S. 131; *Thorington* v. *Montgomery,* 147 U. S. 490. In the Fourteenth Amendment the provision regarding the taking of private property is omitted and the prohibition against the state is confined to its depriving any person of life, liberty or property without due process of law.

It is established that a person is deprived of his property without due process of law, in violation of the Fourteenth Amendment, if such property be taken by or under state authority for any other than a public use, by the assumption of the right of eminent domain. *Head* v. *Amoskeag Mfg. Co.,* 113 U. S. 9; *Kaukauna Co.* v. *Green Bay etc. Canal,* 142 U. S. 254; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112; *Missouri Pacific Co.* v. *Nebraska,* 164 U. S. 403; *Chicago, Burlington & Quincy Ry. Co.* v. *Chicago,* 166 U. S. 226.

In that way the question whether private property has been taken for any other than a public use raises a Constitutional issue even where the taking is under the authority of the state instead of the Federal government. *Fallbrook Irrigation District* v. *Bradley* (*supra*).

The prohibition against the taking of private property for public use, except upon the payment of just compensation, clearly implies that it can not be taken for private

use at all. *United States* v. *Certain Lands in City of Louisville*, 9 Fed. Supp. 137, 138.

Lewis, in his work on *Eminent Domain* (*3rd Ed.*) says (Sec. 258):

> "Public use means the same as use by the public * * *. If the Constitution means that private property can be taken only for use by the public, it affords a definite guide to both the legislature and courts. Though the property is vested in private individuals or corporations, the public retain certain definite rights to its use or enjoyment and to that extent it remains under the control of the legislature. If no such rights are secured to the public, then the property is not taken for a public use and the act of appropriation is void."

In *United States* v. *Certain Lands in City of Louisville* (*supra*), where the utilization of the power of eminent domain in a program contemplating the use of the condemned property by a restricted group of private persons was held unconstitutional, the court further held that "public use" for the purpose of eminent domain means use by the government in the performance of governmental functions or a use available as of right to all or a part of the public. In rejecting the argument that "public use" was synonymous with "public benefit", "public advantage" or "general welfare", the court indicated that whether the public will have the use of the property taken under a particular statute is a question readily ascertainable from the statute itself, but whether a particular improvement will be of "public benefit", "public advantage" or for the "general welfare" of the public is merely a question of opinion, about which men may differ and which can not be referred to any definite criterion.

"The moment the mode of use is disregarded, and we permit ourselves to be governed by speculations upon

benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principles to guide us." *Bloodgood* v. *Mohawk & H. River Co.*, 18 Wend. (N. Y.) 9, 31.

Since this Court has indicated that in enforcing the Fourteenth Amendment, it would regard with respect the views of state courts upon what should be deemed public uses in any state inasmuch as the determination of such question is largely influenced by local conditions *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, the views of the New York Court of Appeals are significant. In *Matter of the Application of New York* v. *New York Central & Hudson River Railroad Co.*, 135 N. Y. 253, that court stated (p. 259):

> "Speaking in general terms I should say that the public must, under proper police regulations, have the right to resort to the land or property for the use for which it was acquired, independently of the mere will or caprice of any private person or corporation in whom the title to the property would vest upon condemnation. Otherwise the use could not be public * * *."

In *Matter of Petition of N. Y. L. & W. R.R. Co.*, 99 N. Y. 12, the New York Court of Appeals said (p. 24):

> "The test appears to be, not what it does or may choose to do, but what under the law it must do, and whether a public trust is impressed upon it. It does not so hold its property impressed with a trust for the public use unless its charter puts that character upon it and so that it can not be taken off. If the law of its existence does not prevent it from being a mere private corporation, from disregarding if it pleases all public uses; if it may abandon its

> business at any moment and refuse to run its propellers and sell its lands by an absolute title without responsibility to the sovereign, which is permitted by its charter (Sec. 2); in short if under that charter it may be a purely private corporation, its property is not so held as to be exempt from a taking under a law of eminent domain."

Applying the foregoing criteria for determining "public use" to the instant case, it is clear that the use to which the property sought to be condemned is to be put is not a "public use". Under the proposed contract with the redevelopment company all public streets in the area are to be closed and discontinued (R. 18, 55); it is proposed to have an average rental of not to exceed $14 per room as compared with the present average rental of $7 per room thereby resulting in wholesale eviction of present occupants of the area (R. 36-7); the public will not be admitted to this walled town in the heart of the City of New York except by sufferance of the redevelopment company (R. 37-8). Clearly the public will have no "right to resort to the land or property for the purpose for which it was acquired, independently of the mere will or caprice of any private person or corporation in whom title to the property would vest upon condemnation". *Matter of the Application of New York* v. *New York Central & Hudson River Railroad Co.* (*supra*). Furthermore, the redevelopment company could shake off the safeguards of control imposed upon it and alienate the property acquired by it as a result of condemnation to another corporation or even to itself, if "reconstituted". Such transfer could be accomplished by the mere waiver of tax exemption privileges and would free the property from all restriction or regulation of the statute authorizing the taking. Since the statute creating the redevelopment company not only does not prevent it from

turning itself into a mere private corporation at its election, but expressly sanctions a dissolution of the redevelopment company and allows a conveyance of the property acquired by eminent domain to another corporation or to itself "reconstituted", free of all restriction (L. 1943, Sec. 23. 24, ch. 234), it is impossible to regard the purpose of acquisition of the property involved as being for a "public use". *Matter of Petition of N. Y. L. & W. R.R. Co.* (*supra*).

The extent to which the exercise of the power latent in the redevelopment company may be carried is readily foreseen. After acquisition of valuable properties through the exercise of the power of eminent domain, real estate value may increase as a result of market conditions. It will then be to the decided advantage of the redevelopment company to renounce tax exemption benefits and thereby relieve itself of the statutory limitations placed upon it. It could then increase rents and so increase profits or sell the property at as large a profit as could be obtained—all without any limitation or regulation. This was clearly stated by Untermyer, *J.*, of the Appellate Division of the Supreme Court in his dissenting opinion when he declared (R. 195-6):

> "* * * such a corporation, after exercising the power of eminent domain, might at any time shake off all the safeguards which the Constitution requires as a condition of the exercise of that power by the simple expedient of relinquishing the benefit of tax exemption. I cannot believe that these salutary provisions of the Constitution are satisfied by restrictions from which the corporation may escape at will * * *.
>
> The time may come when rentals shall increase beyond the levels specified in the contract between the corporation and the City of New York * * * then

> it may be to the advantage of the corporation to renounce the tax exemption, relieve itself from the limitations imposed by statute and the contract, demand as much rent as it can earn and even alienate property acquired by condemnation almost as freely as if the restraints required by the Constitution had never been imposed."

The very suggestion of the extent to which the exercise of such power might be carried, compels its rejection. *United States* v. *Certain Lands in City of Louisville* (*supra*). This same court said in language equally appropriate to the instant case (pp. 141-142):

> "The language of the statute forces one to the conclusion that the proposed buildings are to be constructed for the use of those private individuals who may be selected by the agencies for their enjoyment. The right to purchase the buildings or to lease them is not a right made available by the statute to all of the public upon equal terms, free from the will of governmental agencies, or to any part of the public. The matter of whether the property will be sold or leased, and to whom sold or leased and upon what terms, is entirely within the discretion of the administrative branch of the government, with no rule laid down in the statute which that department is compelled to reject or follow. Therefore, the buildings proposed to be constructed are not to be devoted to a public use, in the sense that they are to be used to house legitimate governmental activities, nor are they to be devoted to a public use in the same sense that the statute makes them available as a matter of right and upon equal terms to all the public or any part thereof."

2. The majority of the New York Court of Appeals failed to recognize that the Redevelopment Companies Law as amended in 1943 endeavored to accomplish by indirection what it could not constitutionally do directly.

The Redevelopment Companies Law as amended in 1943 grants the power of eminent domain to a municipality in form but in substance this power is given to the private redevelopment company. According to the contract proposed to be entered into between the municipality and the redevelopment company, the private company is to indicate by maps or surveys prepared by it the exact property desired by it and the municipality following the instructions of the private company is to go through the motions of condemnation at the request of the private company and the private company is to pay the cost of acquisition and all expenses attendant thereon (R. 52-53).

Under the provisions of Article XVIII of the New York State Constitution it was constitutionally impossible for the power of eminent domain to be given to a private corporation unless such corporation was circumscribed by certain necessary restrictions to safeguard the public. On the other hand it was not necessary under the constitutional mandate for the grant of similar power to a municipality to be surrounded by any safeguards.

What was done in the instant case was to give the power of eminent domain in substance to the private redevelopment company, which concededly is not a corporation "regulated by law" in the manner prescribed by Article XVIII of the New York State Constitution under the disguise, thinly veiled, of giving the power in form to a municipality. This was clearly pointed out in the dissenting opinion of Chief Judge Lehman in the Court below when he stated:

> "Nor may the power of eminent domain be granted to a city or public corporation for the

> purpose of taking private property to be transferred to and held thereafter by a private corporation to which the power of eminent domain could not be granted directly."

Form is not the only thing essential to due process of law. *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, 695. Due process of law requires that the parties or officers proceeding to make the appropriation shall keep within the authority conferred and observe every regulation which the act makes for the protection or in the interest of the property owner. *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago,* 166 U. S. 226, 241; 2 Story Const. Sec. 1956.

In *Chicago etc. R. Co.* v. *Illinois,* 200 U. S. 561, dealing with a matter in which form was observed and the public purpose was ostensibly served, but where the substance clearly showed that the public purpose could be defeated by the means employed, this Court stated (p. 587):

> "If the means employed have no real substantial relation to the public objects, which government may legally accomplish; if they are arbitrary and unreasonable beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt."

It has been shown in the recitation of facts that Metropolitan Life Insurance Company refused to interest itself in the redevelopment-project when first approached by Commissioner Moses after the passage of the 1942 Law. It was only after the amendments to the 1942 Law, proposed and drawn by Metropolitan Life Insurance Company, had been adopted, that Metropolitan Life Insurance

Company consented to undertake the project. An analysis of the 1943 Law shows that the only significant change from the 1942 statute is the addition of provisions which permit the redevelopment company to dissolve at any time and convey its properties to another private company, not subject to any control, by merely giving up tax exemption benefits.

In a memorandum to the Board of Estimate, dated May 28, 1943, Commissioner Moses frankly concedes that the proposed project is a private insurance rehabilitation project and not a public project. He says (R. 170-171).

> "The claim is made that an insurance company project, such as Stuyvesant Town, is in fact a public project because the City closes streets, grants partial tax exemption and extends the power of eminent domain. * * * They are inducements to a responsible fiduciary to undertake an extremely hazardous enterprise of City slum clearance and to make an investment which conservative trustees would not ordinarily undertake. The trustees must look ahead over a period of many years. They can not be expected to turn over to all sorts of future public officials control over the daily management of housing facilities into which they have put a huge amount of the funds of millions of policyholders. Those who insist upon making projects of this kind a battleground for the vindication of social objectives, however desirable, and who persist in claiming that a private project is in fact a public project, obviously are looking for a political issue and not for results in the form of actual slum clearance."

The clear indication that the 1943 Law was promulgated at the specific request of Metropolitan Life Insur-

ance Company and that the amendments were in fact drafted by it and that the amended statute was intended to provide "inducements to a responsible fiduciary to undertake" the project are all matters which might properly be held to have a material bearing upon the question of whether the proposed use might not in fact be a public use. *Clark* v. *Nash,* 198 U. S. 361, 368.

It was never intended that the power of eminent domain should be exercised as an inducement to a responsible fiduciary to undertake a project unless the enterprise is charged with a public trust and retains the character of the public purpose which cannot be shaken off at will. To hold otherwise would permit by the subterfuge of an ostensible public purpose, the condemnation of private property for private use.

It is evident that Metropolitan Life Insurance Company was chiefly interested in the determination to be the sole judge of whether or not the project should retain the character of an ostensible public purpose or that of a private one. This only served to further the private interests of Metropolitan Life Insurance Company. The right given to the redevelopment company to shake off the safeguards imposed by law for the benefit of the public and to turn the project into a purely private enterprise, free of all restriction or regulation has "no real substantial relation to the public objects" and is clearly "beyond the necessities of the case". *Chicago etc. R. Co.* v. *Illinois* (*supra*).

To sanction the condemnation of private property under these circumstances would amount to taking private property of one person without his consent for the private use of another, and would be in violation of the due process clause of the Fourteenth Amendment.

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari directed to the Supreme Court of the State of New York, New York County, be granted to review the decision and order of the Court of Appeals of the State of New York.

MENAHEM STIM,
Attorney for Petitioners.

MARTIN N. WHYMAN,
Of Counsel.

January 6, 1944.

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FILED

JAN 27 1944

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1943

No. 616

IN THE MATTER OF THE APPLICATION

of

MARY V. MURRAY, *et al.*,

Petitioners,

against

FIORELLO H. LA GUARDIA, *et al.*, constituting the Board of Estimate of the City of New York, THE CITY OF NEW YORK, STUYVESANT TOWN CORPORATION AND METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

BRIEF OF RESPONDENTS, THE BOARD OF ESTIMATE OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIORARI.

January 24, 1944.

IGNATIUS M. WILKINSON,
Corporation Counsel,
Counsel for Respondents, The Board of Estimate of The City of New York and The City of New York,
Municipal Building,
New York, N. Y.

JEREMIAH M. EVARTS,
Of Counsel.

Supreme Court of the United States

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In the Matter of the Application

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Mary V. Murray, *et al.*,

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Respondents.

BRIEF OF RESPONDENTS, THE BOARD OF ESTIMATE OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIORARI.

The case does not present a federal question. It is concerned solely with the construction of Article XVIII of the Constitution of the State of New York and the Redevelopment Companies Law enacted pursuant thereto. (Laws of New York, 1943, Ch. 234.) In construing the Constitution and the Statute, the Court of Appeals has decided questions of state law which are not a subject for re-examination by this Court.

I.

First, petitioners contend that the power of eminent domain is not being exercised for a public use or purpose (Pet., p. 3). The utter lack of merit in this contention is demonstrated by the determination of the People of the State in amending the Constitution of the State and by the State Legislature. Both the Constitution and the Statute declare that the purpose of rehabilitation of substandard and insanitary areas in the municipalities of the State is a public purpose.

Article XVIII of the Constitution of the State of New York was proposed, after thorough debate, by the Constitutional Convention of 1938 (New York State Constitutional Convention, Revised Record, Vol. II, pp. 1499-1585; Vol. III, pp. 1665-1718). It was adopted by the People in that year. Section 1 of that Article specifically declares that the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas is one of two purposes for which the Legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe. The other purpose contained in Section 1 of the Article is low cost public housing.

By Section 8 of the Article the purposes specified in Section 1 are declared to be "public purposes." Even before the adoption of the Article the Court of Appeals of New York had recognized "the public evils, social and ecomonic" which are caused by blighted urban areas. *Matter of New York City Housing Authority* v. *Muller*, 270 N. Y. 333, 339 (1936). The existence of these local conditions because of their nature and extent had become a matter of concern to the public as a whole. Cf. *Carmichael* v. *Southern Coal & Coke Company*, 301 U. S. 495, 514-518 (1937). Consequently, the People of the State of New York declared the rehabili-

tation of such areas to be a public purpose and conferred upon the State Legislature a broad grant of power to enact laws for the accomplishment of that purpose.

The Redevelopment Companies Law specifically declares (Section 2) that the clearance, replanning and rehabilitation of substandard and insanitary areas in accordance with official city plans by redevelopment companies are "public uses and purposes for which private property may be acquired for such corporations and partial tax exemption granted." This is followed by a declaration that "the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination."

Whether or not the provisions of the Redevelopment Companies Law exceeded or contravened the limitations upon legislative power contained in Article XVIII of the Constitution is a matter to be decided by the highest court of the State of New York. The Court of Appeals has construed the constitutional provision and the law designed to effectuate its purpose by enlisting the aid of private non-speculative capital. It has found that the law is constitutional. These findings are conclusive here. *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32 (1924); *Minnesota Ex Rel. Pearson* v. *Probate Court*, 309 U. S. 270, 273-274 (1940).

It follows that the taking of property through eminent domain by the City and the granting of tax exemption by the City pursuant to the provisions of this law are powers validly exercised in aid of the public purpose of rehabilitation. Such aid by the municipality is expressly authorized by the Constitution and declared by the Statute to be necessary for the accomplishment of the purpose.

It has long been the rule of this Court that what may be considered a public purpose is a matter primarily of State concern. *Clark* v. *Nash*, 198 U. S. 361, 367-8 (1905);

Jones v. *City of Portland*, 245 U. S. 217 (1917). And in *Hairston* v. *Railway Co.*, 208 U. S. 598 (1908), this Court said at page 607:

> "No case is recalled where this Court has condemned as a violation of the Fourteenth Amendment a taking upheld by the State court as a taking for public uses in conformity with its laws."

II.

Petitioners' second contention is that a violation of the due process clause of the Federal Constitution exists because the Stuyvesant Town Corporation, the recipient of the property taken by eminent domain, is not regulated by law throughout its life (Pet., p. 3). This contention is absurd. The Federal Constitution contains no such requirement. As we have seen *supra*, the Court of Appeals found that the taking of property and the granting of tax exemption were powers validly exercised to accomplish a public purpose. The Court further found that the accomplishment of the purpose was insured by other provisions of the law regulating the corporation and the use to which the property must be put (R. 215-216).

III.

A clearer case could not be found for applying the doctrine that public purposes are primarily matters of state concern and that an infringement of the Fourteenth Amendment is not presented by a holding of the highest State Court that property is being taken for a public use in conformity with its Constitution and laws. The findings of the Court of Appeals that a public use is served by eminent domain and tax exemption are buttressed not simply by a legislative determination, but by a constitutional amendment adopted by the People of the State.

CONCLUSION.

The petition for certiorari should be denied.

January 24, 1944.

Respectfully submitted,

IGNATIUS M. WILKINSON,
Corporation Counsel,
Counsel for Respondents, The Board of Estimate of the City of New York and The City of New York,
Municipal Building,
New York, N. Y.

JEREMIAH M. EVARTS,
Of Counsel.

LAWYERS PRESS, INC., 165 William St., N. Y. C.; 'Phone: BEekman 3-2300

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Respondents.

BRIEF OF RESPONDENTS METROPOLITAN LIFE INSURANCE COMPANY AND STUYVESANT TOWN CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CHURCHILL RODGERS,
Attorney for Respondents,
Metropolitan Life Insurance Company
and Stuyvesant Town Corporation,
1 Madison Avenue,
Borough of Manhattan,
New York City, New York.

SAMUEL SEABURY,
Of Counsel.

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Respondents.

BRIEF OF RESPONDENTS METROPOLITAN LIFE INSURANCE COMPANY AND STUYVESANT TOWN CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

Petitioners moved at Special Term of the Supreme Court of the State of New York, New York County (9-38 *) to enjoin respondents, *pendente lite*, from proceeding with a contract for the clearing and redevelopment of a substandard area in the City of New York pursuant to the New York Redevelopment Companies Law (Laws 1943, Chap. 234; McKinney's N. Y. Unconsolidated Laws, 1943, Title "Housing").

---

* Unless otherwise indicated, numbers in parentheses refer to pages of the Record on Appeal.

A cross motion by respondents to dismiss the petition on the merits was granted at Special Term (180 N. Y. Misc. 760) by an order which was affirmed in the Appellate Division, two Justices dissenting (266 App. Div. 912), and in the Court of Appeals, two Judges dissenting (207-219; 291 N. Y. ....., not yet officially reported).

Petitioners now seek a writ of certiorari.

Jurisdiction.

Petitioners invoke jurisdiction under Judicial Code, Sec. 237 (28 U. S. C. A. 344) on the ground that there are two constitutional objections to the Law ("Questions Presented"; Petition for Writ, p. 3). Succinctly stated, these two alleged objections are that the Redevelopment Companies Law (hereinafter referred to as "the Law") sanctions the exercise of the power of eminent domain for the benefit of a redevelopment company, but permits the company to shake off public regulation at will. As appears below (pp. 9-12), the New York Court of Appeals has construed the Law otherwise, and its construction of the Law destroys the basis of petitioners' objections.

Statement.

The "Housing" Article of the New York State Constitution.

The Law was passed to implement the Housing Article of the Constitution of the State of New York, adopted by the people in November 1938. This Article (XVIII) empowers the Legislature to provide, among other things, for (Sec. 1):

> "the clearance, re-planning, reconstruction and rehabilitation of substandard and insanitary areas",

which are expressly described in the Article (Sec. 8) as "public purposes".

> "For and in aid of such purposes",

the Legislature is empowered (Sec. 2) to:

> "grant or authorize tax exemptions in whole or in part"

for not exceeding sixty years, and to

> "grant the power of eminent domain to any city",

but the City is prohibited from itself constructing and operating a redevelopment project (Sec. 10).

These provisions, authorizing the Legislature to empower cities to condemn land for redevelopment projects and to authorize tax exemptions thereon, but prohibiting cities from themselves constructing or operating such projects, make it clear that the constitution contemplates that the City may acquire property for redevelopment purposes and then convey it to a corporation for redevelopment.

The Housing Article empowers the Legislature (Sec. 1) to carry out the purposes of the Article

> "in such manner, by such means and upon such terms and conditions as it may prescribe".

It provides further (Sec. 10) that:

> "The legislature is empowered to make all laws which it shall deem necessary and proper for carrying into execution the foregoing powers",

and

> "This article shall be construed as extending powers which otherwise might be limited by other articles of this constitution and shall not be construed as imposing additional limitations; * * *."

Thus the Legislature was given the broadest possible latitude in adopting legislation to effectuate the purposes of the Housing Article of the Constitution.

The Law.

The Law was first enacted in 1942 (Chapter 845). In its original form, it failed of its purposes: it made redevelopment projects so hazardous that private capital refused to take the risks (161). Some of these were eliminated by amendment in 1943 (Chapter 234), and it should be observed, in passing, that there is no support whatever in the record for the innuendoes in the Petition for the Writ of Certiorari (pp. 4, 16, 17, 18-19) that these amendments were the result of collusion and conspiracy among Metropolitan, the City, and the Legislature.

In approving the 1943 bill, Governor Dewey said:

> "This bill amends the Redevelopment Companies Law of 1942. The law permits and encourages the entrance into the housing field of life insurance companies. Since the enactment of the original law, there have been no projects. The amendments made by this bill are designed to attract private investment funds into the housing field.
>
> "Were all of the $300,000,000 made available by the Constitution for the development of public housing utilized immediately, it would still be but a drop in the housing bucket. The solution of the housing problem calls for the extensive use of both public and private resources as well as the effort of the thirteen and a half million people of this State. This bill is a step in that direction."

In the Law, the Legislature has "declared" (Sec. 2) that:

> "public interest" requires the clearance, replanning and reconstruction of existing substandard and insanitary housing conditions;

these conditions "depress and destroy" the economic value of large areas and "threaten the sources of public revenue";

these conditions cannot be remedied "by the ordinary operations of private enterprise", and corporations must be "encouraged" to do so pursuant to the requirements of city planning;

the necessary real property must be acquired for such corporations at "fair prices", and they must be assisted by "partial tax exemption";

the clearance and rehabilitation of such areas

> "are public uses and purposes for which private property may be acquired for such corporations and partial tax exemption granted";

and

> "the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination."

The Legislature went even further: it provided (Sec. 20) that property previously condemned, or already in use, for other public purposes may be taken for a redevelopment project

> "it being hereby expressly determined that the public use in conformity with the provisions of this act shall be deemed a superior public use".

Provision is made (Sec. 4) for the incorporation of "redevelopment" companies to clear and rehabilitate substandard and insanitary areas in accordance with the Law, and insurance companies are authorized to organize and finance them, and to own their stock (Sec. 25).

The Contract and the Plan for the project must be submitted to, and be approved by, the municipal authorities

[Secs. 15 and 3 (6, 7)]. Where, as here, the redevelopment company is financed by an insurance company, the Contract and Plan must also be approved by the State Superintendent of Insurance [Secs. 15, 3 (10)].

The Law expressly authorizes the City to condemn real property and convey it to a redevelopment company. Thus Sec. 20 provides that in the event of certain conditions precedent, all of which were complied with here:

> "A municipality may take property by condemnation for a redevelopment company",

and

> "when title to the real property shall have vested in the municipality, it shall convey the same to the redevelopment company * * *".

Although the Housing Article of the Constitution empowered the Legislature to vest the power of eminent domain in "public" corporations, in "regulated" private corporations, and in cities (Sec. 2), the Legislature conferred the power on cities alone, and authorized them to convey land so acquired to redevelopment companies (Law, Sec. 20). Even so, the City may not condemn until the redevelopment company has first complied with certain terms and conditions fixed by the Law, such as submission to, and approval by, the City of plans and specifications for the project, the execution of a contract for the construction of the development on terms satisfactory to the City, the deposit with the City of all amounts necessary to pay condemnation awards, costs and expenses, etc. etc. (Sec. 15, 20).

Thus it is manifestly erroneous to say, as petitioners do (Petition for Writ, p. 16) that, "in substance", the Law empowers the redevelopment company itself to exercise the power of eminent domain. On the contrary, whether or not this power shall be exercised and the extent to which it shall be exercised, the location and limits of the site, and all other

matters of this nature are vested in the sole discretion of city officials (Secs. 15, 20).

The redevelopment company cannot condemn land under any circumstances; and even the City may not condemn land and convey it to the company unless it first (1) undertakes, by contract satisfactory to the City, that it will do with the land only what the City chooses to have done with it; and (2) deposits with the City all sums required to finance the condemnation (Secs. 15, 20).

The Law authorizes the Board of Estimate to contract with a redevelopment company to exempt it, for a period not exceeding twenty-five years, from certain local and municipal taxes, but, at most, only to the extent of the increase in value created by the redevelopment (Sec. 26). The benefits of tax exemption commence only when the project is completed and the public purpose of redevelopment has been performed (Sec. 26; Opinion, 215-216). The redevelopment company may, at any time after the project is completed, pay up all tax exemptions previously received by it, with interest at 5% per annum, and thereupon the tax exemption terminates (Sec. 26; Opinion, 215-216).

Redevelopment companies are made subject to certain regulation by the public authorities (Secs. 4, 5, 6-14, 16, 20-24). After termination of tax exemption, a redevelopment company may convey the project, and thenceforth the Law is inapplicable to it (Sec. 24).

The Project.

The redevelopment project here involved relates to an area consisting of eighteen city blocks in the Borough of Manhattan, City of New York (51).

The terms upon which the project is to be accomplished are set forth in a written contract between The City, Stuyvesant, and Metropolitan (46-68), which has been duly ap-

proved by the City Planning Commission (133-150), the City Board of Estimate, and the State Superintendent of Insurance (49).

The Contract and Plan of the project (133 *et seq.*) call for the construction of some thirty-five buildings containing approximately 32,000 residential rooms, which, it is estimated, will house about 24,000 persons in 8,842 apartments (60, 139).

By the contract (58, Par. 306), the City grants, for 25 years commencing from completion of the project, tax exemption to the extent of the excess value of the area as redeveloped over its value at the time of acquisition for the project: taxes on the basis of the assessed value at time of acquisition—estimated as of June 1st, 1943, the date of the contract, at $13,769,900 (174-5)—are at no time exempted (58-9).

The contract further provides (63-4) that Stuyvesant may, at any time after five years from the completion of the project, elect to pay the total of all previously exempted taxes, with interest at 5% per annum, and thereupon tax exemption of the project shall cease.

Petitioners' Contentions.

Petitioners contend:

1. The condemnation of property by the City for a redevelopment project is not a taking for a "public use" because the City conveys the property to a corporation which can shake off public regulation at will by waiving its tax exemption whenever it chooses; and

2. The use is not "public" because (a) the redevelopment company may ultimately reap a profit out of the project, and (b) all members of the public will not at all times

have free access to the project and (c) the project is not to be for the benefit of present slum dwellers.

Contention 1 is not in the case: the construction put upon the law by the New York Court of Appeals destroys its major premise. Contention 2 is frivolous and presents no "substantial" question.

POINT I.

Petitioners contend that the law is unconstitutional because it permits a redevelopment company to waive tax exemption at any time, and thereby shake off public regulation at will. This so-called constitutional objection has been eliminated from the case by the decision of the New York State Court of Appeals, construing the law to provide for the continuation of public regulation at least until the project has been completely constructed and the public purpose for which the project was designed has been fully accomplished.

Petitioners' principal contention is that the law is unconstitutional because it permits a redevelopment company, by waiving its exemption at any time it chooses, to terminate public regulation at will (Petition for Writ, pp. 6-7, 13-16, 19).

By the terms of the Housing Article, the Legislature is required to regulate redevelopment companies, only in the event that it invests them with the power of eminent domain (Sec. 2). The language is clear, and the state Court of Appeals has so construed it (Opinion, 216-217). Since the Legislature did not invest redevelopment companies with the power of eminent domain, it was under no constitutional injunction to impose any public regulation whatever upon them. The matter was left in the discretion of the Legislature, under its express power to prescribe the "terms and conditions" pursuant to which redevelopment shall be

accomplished (Article XVIII, Sec. 1). The New York Court of Appeals was clear on this; it said (Opinion, 216-217):

> "There is no requirement, as asserted by the petitioners, that Stuyvesant must be subjected to regulation by law for all time as to rents, profits, dividends and the disposition of its property. The Constitution (art. 18, § 2) provides for only two instances where such regulation is required. One instance is where loans are authorized by the state and by any city, town or village to corporations regulated by law as to such rents, profits, dividends and disposition of property and engaged in providing housing facilities. The other instance is where the power of eminent domain is granted directly to the corporation. In the present case Stuyvesant is to receive no loan of funds from the State, nor from any city, town or village. Nor is Stuyvesant granted the power of eminent domain. Under the statute (§ 20) and under the proposed contract (parags. 202-204) the power of eminent domain is to be exercised only by the city which under conditions set forth in the statute (§ 20) may convey to Stuyvesant the title to all property thus acquired."

Since the Legislature, in its wisdom, might have provided for no public regulation at all, there certainly is no room for complaint because it provided for public regulation which may be terminated after the project has been completed and the public purpose has been fully accomplished. That is what this statute does: it provides for regulation until "termination of tax exemption" [Sec. 24 (1)]; and provides that tax exemption can, in no event, terminate until after the project has been fully completed and the public purpose accomplished (Sec. 26). Our Court of Appeals has so construed the Law. In its opinion it said—the italics being by the Court (215-216):

> "In the project here involved the tax exemption which may be granted to Stuyvesant will commence

> —as prescribed by both the statute (§ 26) and the proposed contract (parag. 306) 'from the date on which the benefits of such exemption shall first become available and effective.' That date is fixed by the contract (parag. 306) as follows: 'The date on which the benefits of such exemptions shall first become available and effective shall be *the date of completion of the project.*' It is thus made clear that such tax exemption, which, as we have seen, is limited to the value of *improvements* made within the area, cannot occur until the project itself—the work of redevelopment and rehabilitation within the substandard area—has been completed and the public purpose for which the project was designed has been accomplished."

Indeed, the contract between the parties goes even further. It provides that the right of the corporation to waive tax exemption may not be availed of until at least five years after the completion of the project (63-64; Article VI, par. 601), so that public regulation is assured not only until the completion of the project, but for at least five years thereafter.

The foregoing construction of the Law—a state statute—by the highest Court of the State is conclusive here. As this Court said in *Knights of Pythias* v. *Meyer,* 265 U. S. 30, at page 32:

> "Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of State legislation, as though such meaning had been specifically expressed therein."

The Legislature having withheld the power of eminent domain from redevelopment companies, there would be no unconstitutionality in the Law, even if no public regulation at all had been imposed upon them. However, the Law does

impose regulation, and as the decision of the Court of Appeals of the State of New York establishes, the regulation insures the accomplishment of the purpose and can not be shaken off at will; by the terms of the Law, regulation must continue at least until the project has been completely constructed and the public purpose entirely accomplished. This construction of the Law by the highest Court of the State eliminates from the case the so-called constitutional objection based on petitioners' erroneous premise that public regulation may be shaken off at will.

POINT II.

The State Constitution and the Law expressly declare the use to be public, and the State Court of Appeals has held that it is public. In such circumstances, petitioners' contention that the Law is unconstitutional because it provides for a use which is not public is frivolous, and raises no substantial question.

The Constitution of the State of New York authorizes the Legislature to enact laws (Article XVIII, Sec. 1) for

> "the clearance, replanning, reconstruction and rehabilitation of substandard and unsanitary areas",

and expressly proclaims (Sec. 8) that a taking for these purposes is a taking for "public purposes".

The Law itself declares, as a matter of legislative determination, not merely that these are "public uses and purposes", and that the provisions of the Law are a "necessity in the public interest" (Sec. 2), but that (Sec. 20)

> "the public use in conformity with the provisions of this act shall be deemed a superior public use."

Moreover, the Court of Appeals has judicially determined, on the basis of the particular conditions existing in

blighted areas in the State of New York, that the use is a public one. In its opinion that Court points out (Opinion, 209):

> "For a long period of years both State and Municipal governments have recognized an ever increasing social and economic loss due to conditions in those blighted urban area where slums exist. It is a fact within common knowledge that conditions prevailing in slum areas affect the health, safety and welfare of the public, causing indirectly a heavy capital loss and a diminishing return of tax revenues. We took notice of the existence of those conditions and their demoralizing effect when it was said in behalf of the court by CROUCH, J.—'The public evils, social and economic of such conditions, are unquestioned and unquestionable'. (*Matter of New York City Housing Authority* v. *Muller*, 270 N. Y. 333, 339.)"

Further (Opinion, 218):

> "The People, by the adoption of article 18 of the State Constitution, and the Legislature, by the enactment of the Redevelopment Companies Law, have recognized that the sinister effect of substandard, insanitary areas, wherever slums exist, exerts a malign influence upon the community at large and thus justifies public control and corrective measures. The corrective statute with which this proceeding is concerned is an effort by the Legislature to promote cooperation between municipal government and private capital to the end that substandard, insanitary areas in our urban communities may be rehabilitated."

And again (Opinion, 214, italics by the Court):

> "We find no sound basis for the constitutional objection advanced by the petitioners that the condemnation of private property authorized by the Redevelopment Companies Law is not for a public use. Such a suggestion is refuted by the language of the

> Constitution itself which specifically proclaims that those separate grants of power to the Legislature made in article 18 section I—to provide for low rent housing *or* for clearance and rehabilitation of substandard areas—are 'public purposes'. The question of what is a public purpose being primarily a matter of state concern (*Clark* v. *Nash*, 198 U. S. 361, 367-8), we look to the formal statement of legislative policy which is declaratory of the purpose and led to the enactment of the Redevelopment Companies Law. That statement in the statute (§ 2) concludes as follows: ' * * * the necessity *in the public interest* for the provisions hereinafter enacted is hereby declared as a matter of legislative determination.' (See also § 20.)"

After referring to the serious public evils sought to be remedied by the Law, the Court of Appeals said (Opinion, 218):

> "We are not persuaded that the enactment for that purpose—the statute now challenged by the petitioners—is unreasonable, arbitrary or capricious, or that it bears no real and substantial relation to the object sought to be attained. (Nebbia v. New York, 291 U. S. 502, 525.) Nor do we find in the statute such a 'clear usurpation by the Legislature of prohibited power as must be found before a statute can be pronounced unconstitutional and void.' (Ricker v. Village of Hempstead, 290 N. Y. 1, 5; People ex rel. Metropolitan Street Railway v. Tax Commissioners, 174 N. Y. 417, 437.)"

Unless the finding is palpably without reasonable foundation, the judgment of the highest court of a state on what constitutes a public use in that state is followed by this Court in determining the applicability of the 14th Amendment:

> *Hairston* v. *Railway Co.*, 208 U. S. 598;
> *Union Lime Co.* v. *Railway Co.*, 233 U. S. 211;

Rindge Co. v. *Los Angeles*, 262 U. S. 700;
U. S. v. *Gettysburg Electric Railway Co.*, 160 U. S. 668.

In the *Hairston* case, this Court said (208 U. S. 598, at p. 607):

> "No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws."

As the Court said in *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, 705, 706:

> "The nature of a use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any state."

The principle, as stated by Judge DILLON in his work on "Municipal Corporations" was adopted by this Court in *United States* v. *Gettysburg Electric Railway Co.*, 160 U. S. 668, to wit, p. 680:

> "* * * when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation."

The New York Court of Appeals has held in this case that "conditions prevailing in slum areas" in the State "affect the health, safety and welfare of the public", and that the "public evils, social and economic, of such conditions are unquestioned and unquestionable"; that "the

sinister effect" of these conditions is a "malign influence upon the community at large and thus justifies public control"; that the legislative enactment to cure these evils is not "unreasonable, arbitrary or capricious" or a "usurpation" of power, and is not "without reasonable foundation." Upon such findings, we submit, this Court will not override the judgment of the highest Court of the State that the use is a public one.

Petitioners suggest (Petition for Writ, p. 13) that the law is unconstitutional because Metropolitan may, conceivably, some day reap a profit out of the project. That contention was answered by the New York Court of Appeals as follows (Opinion, 214-215):

> "Nor do we find merit in the related argument that unconstitutionality results from the fact that in the present case the statute permits the city to exercise the power of eminent domain to accomplish a project from which Metropolitan—a private corporation—may ultimately reap a profit. If, upon completion of the project the public good is enhanced it does not matter that private interests may be benefited. (Hudson v. Fonda, 249 N. Y. 445, 453.)"

The cases in this Court are to the same effect:

> *Brown* v. *U. S.*, 263 U. S. 78;
> *Clark* v. *Nash*, 198 U. S. 361;
> *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527;
> *Hairston* v. *Railway Co.*, 208 U. S. 598.

There is also a suggestion (Petition for Writ, p. 13) that the taking is not for a public use because apartments in the project will not be within the reach of present slum dwellers. The complete answer to that contention was

given by New York Court of Appeals as follows (Opinion, 217, italics by the Court):

> "There remains for consideration the charge that the Redevelopment Companies Law is unconstitutional because it is not confined to slum clearance and to reconstruction for former slum dwellers. The answer, we think, is found in the significant use of the word 'or' in article 18 section I. That constitutional provision grants to the Legislature authority to provide for low rent housing for persons of low income, *'or'* to provide for 'the clearance, replanning, reconstruction or rehabilitation of substandard and insanitary areas.' Authorization is thus given to the Legislature to accomplish either of those two purposes 'or for both such purposes'. The two purposes, however, are distinct, one being designed to authorize low rent housing for persons of low income as defined by law, the other authorizing appropriate legislation to bring about the clearance and rehabilitation of substandard areas as a means to protect public health and morals and to restore and preserve the financial stability of municipalities which suffer indirectly from conditions existing in those blighted districts. (See New York State Constitutional Convention, [1938]; Revised Record, vol. II, pp. 1533, 1559, 1567-1568, 1577, 1581.)"

Another suggestion contained in the Petition for the Writ (pp. 13-15) is that the taking is not for a public purpose because all members of the public will not be free at all times to enter upon the redeveloped area.

The rehabilitation of blighted areas is unquestionably a public purpose, and would be none the less so even if, as an incident to the attainment of that purpose, free and untrammeled access to the property might not be available to all members of the public at all times.

None of the cases cited by petitioners makes this the test of a "public purpose". On the contrary, nothing is

more common than the condemnation of property for a use which precludes the free access thereto by all members of the public at all times, as for example, condemnation for railroad rights of way. Indeed, in *Matter of Application of the Mayor, etc.*, 135 N. Y. 253, cited by petitioners (Petition for Writ, p. 12), the Court sustained the right to condemn for pier purposes in conjunction with the operation of a railroad, and held, directly contrary to petitioners' contention here, that a use may be public, even though (pp. 263-4) the property may be

> "divided off and placed in the exclusive possession of a lessee,"

so that the public could not enter upon it.

A few among the many instances which could be cited of condemnations sustained as takings for "public use", even though the property taken would not be open to the public, are:

> *Brown* v. *U. S.*, 263 U. S. 78;
> *Clark* v. *Nash*, 198 U. S. 361;
> *Strickley* v. *Highland*, 200 U. S. 527.

Petitioners place their principal reliance (Petition for Writ, pp. 11, 15) on statements in the opinion in *U. S.* v. *Certain Lands in City of Louisville, etc.*, 9 Fed. Supp. 137, in which the District Court for the Western District of Kentucky held that the United States had no power to condemn land for a Low-Cost Housing and Slum Clearance Project. In citing that case, petitioners ignore the distinction between the powers of the state and the powers of the federal government in condemnation, although District Judge Dawson, who decided the case, did not (9 Fed. Supp., at p. 142). The distinction was even more emphatically stated in the opinion of the Circuit Court of Appeals

in that case (78 Fed. 2d, 684), in which Circuit Judge MOORMAN said (p. 687):

> "In the exercise of its police power a state may do those things which benefit the health, morals, and welfare of its people. The federal government has no such power within the states."

Petition for Certiorari was dismissed (294 U. S. 735).

Condemnation for re-development purposes under the Law is, in the language of the *Louisville* case, for the benefit of

> "the health, morals, and welfare of its [the state's] people",

and as the Circuit Court of Appeals pointed out in that case, states may authorize the exercise of the power of eminent domain for such purposes, although the federal government may not.

Petitioners' contention that the law is unconstitutional because it provides for a taking which is not for a "public use" is, consequently, frivolous and presents no "subtantial" constitutional question. There is, accordingly, no jurisdiction in this Court to grant a writ of certiorari (*Honeyman* v. *Hanan*, 300 U. S. 14, 23).

Conclusion.

New York State, in its wisdom, amended its constitution in 1938 so as to provide in Article XVIII various methods to accomplish the redevelopment of blighted areas within the state. This article was voted on separately by the people and adopted by a substantial majority. It reflects a progressive, modern, intelligent and conservative attempt to root out long standing, spreading cancerous slum areas in the larger and older cities. This is a proper governmental function.

The Law enacted to effectuate the constitutional mandate provides controls in the public interest which must remain operative at least until the redevelopment project is completely constructed and the public purpose entirely accomplished, and the contract between the City and Stuyvesant insures a continuation of these controls for at least five years thereafter.

The City of New York, after years of effort, has finally succeeded in inducing one large insurance company to invest a very substantial sum of money in clearing some 72 acres of the worst run-down tenements in the heart of the City of New York. This is twice as large as any other project thus far undertaken with public subsidies, and the beneficial effects of this enterprise on the health and welfare of the City will be incalculable.

If the Law were to be declared unconstitutional on the grounds now urged, no private enterprise could enter this field; the great reservoirs of fiduciary capital would be excluded, and the work of redevelopment would be stalled, because it is as financially impossible as it would be economically undesirable to do the work which remains to be done by public money alone.

The petition for a writ of certiorari should be denied.

New York, N. Y., January 25, 1944.

CHURCHILL RODGERS,
Attorney for Respondents,
Metropolitan Life Insurance Company
and Stuyvesant Town Corporation.

SAMUEL SEABURY,
Of Counsel.